No.

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

INDEX

Opinions Below	2
Jurisdiction	2
Question Presented	2
Rule Involved	3
Statement	4
Reasons for Granting Writ	5
Conclusion	10
Appendix	A1

CITATIONS

CASES:

Bruner v. *United States*, 343 U.S. 112 (1952)	9
Butcher & Sherrerd v. *Welsh*, 206 F.2d 259 (3rd Cir. 1953)	9
Cooper v. *R. J. Reynolds Tobacco Company*, 256 F.2d 464 (1st Cir. 1938), cert. den. 358 U.S. 875 (1958)	7
Ginsburg v. *Stern*, 263 F.2d 457 (3rd Cir. 1959)	9
Home Indemnity Co. of New York v. *O'Brien*, 112 F.2d 387 (6th Cir. 1940)	9
Knox v. *First Security Bank of Utah*, 206 F.2d 823 (10th Cir. 1953)	7, 9
Land v. *Dollar*, 330 U.S. 731 (1947)	9
Larson v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949)	9
Lipson v. *Socony-Vacuum Corp.*, 76 F.2d 213 (1st Cir. 1935)	6
Montgomery v. *Realty Acceptance Corp.*, 51 F.2d 642 (3rd Cir. 1931), aff'd 284 U.S. 547 (1932)	6
Myers v. *Bethlehem Corp.*, 303 U.S. 41 (1938)	9

Realty Acceptance Corp. v. *Montgomery*, 284 U.S. 547 (1932) 9

Stewart Die Casting Corp. v. *National Labor Relations Board*, 129 F.2d 481 (7th Cir. 1942) 6

Young v. *Garrett*, 159 F.2d 634 (8th Cir. 1947) 5, 7, 8

Young v. *Garrett*, 5 F.R.D. 117 (W.D. Ark. 1946) 5, 7, 8

Young v. *Garrett*, 208 S.W.2d 189 (S. Ct. Ark. 1948) 8

STATUTES:

Section 4 of the Clayton Act (15 US.C. §15) 4

28 U.S.C. §1254(1) 2

Rule 60(b), Federal Rules of Civil Procedure 3, 7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. .....

WESTERN AUTO SUPPLY COMPANY,
Petitioner

vs.

McELHENNEY CO., INC., W. F. SNIPES, J. T. SNIPES, GEORGE TOOLE, MAC TOOLE, R. P. SWOFFORD, CHARLES L. GASQUE and HARRY CLINK-SCALES, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on November 2, 1960.

OPINIONS BELOW

The *per curiam* opinion of the Circuit Court of Appeals (R. 92-93) is unreported and is printed in the Appendix hereto, *infra*, pp. A2-3. The opinion and order of the District Court dated April 11, 1960 (R. 22-31), is unreported and appears in the Appendix hereto, *infra*, pp. A4-14. The first opinion of the Circuit Court of Appeals in this litigation dated July 16, 1959, printed in the Appendix hereto, *infra*, pp. A15-25, is reported in 269 F.2d 332. The first opinion and order of the District Court in this litigation dated November 18, 1958, printed in the Appendix hereto, *infra*, pp. A26-39, is reported in 167 F. Supp. 949.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 2, 1960 (R. 94), and is printed in the Appendix hereto, *infra*, p. A1. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

On November 18, 1958, the District Court entered an order dismissing respondents' first amended complaint. That order was affirmed without modification by the court below on July 16, 1959, but the court below remanded the case, stating that the remand was to permit respondents to apply to the sound discretion of the District Court for leave to file an amended complaint. Respondents, without moving to vacate the order of dismissal, filed a motion to amend their complaint and the District Court overruled that motion.

The sole question presented by this petition is whether, in view of the fact that respondents never moved to vacate or modify the final order of dismissal entered by the District Court and affirmed by the Court of Appeals, the District Court had jurisdiction to entertain respondents' motion for leave to file their proposed second amended complaint.

RULE INVOLVED

The rule involved is Rule 60(b) of the Federal Rules of Civil Procedure, which in so far as pertinent provides as follows:

> "(b) *Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken. * * *"

STATEMENT

This suit was commenced under Section 4 of the Clayton Act (15 U.S.C. §15) seeking treble damages for claimed violations of the antitrust laws of the United States. The original complaint was filed on June 3, 1957, and thereafter respondents voluntarily filed their first amended complaint (R. 22, 31-61; Appendix, *infra*, pp. A4-5). Petitioner moved to dismiss the first amended complaint for failure to state a claim and on November 18, 1958, the District Court entered its order sustaining the petitioner's motion (R. 22; Appendix, *infra*, pp. A5, A26-39). Respondents appealed from that ruling to the court below and on July 16, 1959, that court handed down its opinion affirming the order of dismissal. In its opinion the court below affirmed without purporting to vacate or modify the judgment of dismissal but stated that it was remanding the case to permit plaintiffs to apply to the sound discretion of the District Court for permission to amend their complaint (Appendix, *infra*, pp. A23-25). The mandate issued by the court below on August 17, 1959, in so far as pertinent, provided as follows (R. 62-63):

> "It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs; and that this cause be, and the same is hereby, remanded to the United States District Court for the Western District of South Carolina, at Spartanburg, to permit further application to be made by the plaintiffs in conformity with the opinion of the Court filed herein."

On September 1, 1959, respondents filed a motion "To Amend Complaint in Conformance with Opinion of the United States Court of Appeals for the Fourth Circuit"

(R. 3) and appended thereto was their proposed second amended complaint (R. 3-22). Petitioner opposed the motion on the ground, *inter alia*, that the District Court was without jurisdiction to entertain the motion because the final order of dismissal entered by the District Court on November 18, 1958, had never been vacated or modified and at no time had respondents applied to any court for an order vacating or modifying the order of dismissal. The District Court in its opinion and order dated April 11, 1960 (R. 22-31; Appendix, *infra*, pp. A4-14) stated that there appeared "to be considerable merit" in petitioner's contention but that it was unnecessary for the court to pass upon the question because it was overruling the motion for leave to amend on the merits (R. 25; Appendix, *infra*, pp. A7-8). Respondents appealed and on November 2, 1960, the court below filed a *per curiam* opinion reversing the District Court without discussing the jurisdictional question raised by petitioner (R. 92-93; Appendix, *infra*, pp. A2-3). Accordingly, judgment was entered on the same date remanding the case to the District Court for further proceedings in accordance with the opinion (R. 94; Appendix, *infra*, p. A1).

REASONS FOR GRANTING WRIT

Petitioner, for reasons hereinafter stated, believes that there is a direct conflict between the decision of the court below and the decision of the Court of Appeals for the Eighth Circuit in *Young* v. *Garrett*, 159 F.2d 634 (1947), which affirmed the decision of the District Court for the Western District of Arkansas in *Young* v. *Garrett*, 5 F.R.D. 117 (1946). However, petitioner's application for a writ of certiorari raises the basic question whether this Court

should, in the exercise of its supervisory jurisdiction, enforce the established rules of federal procedure.

1. The court below originally entered a judgment unconditionally affirming the original order of dismissal by the District Court. If the court below contemplated continuance of the litigation it should have conditioned its order in accordance with accepted practice in other jurisdictions. Cf. *Lipson* v. *Socony-Vacuum Corp.*, 76 F.2d 213 (1st Cir. 1935).[1] The court below not only failed to follow the accepted practice for restoring the case to the trial docket of the District Court but, when confronted with the question on subsequent appeal, completely ignored petitioner's contention that the litigation had been finally terminated by the original affirmance. That the original judgment of the court below may have been entered inadvertently is not of importance.[2] Respondents could have applied for correction of the judgment and mandate of the court below within the term at which that judgment was entered. *Stewart Die Casting Corp.* v. *National Labor Relations Board*, 129 F.2d 481 (7th Cir. 1942). It is not of importance whether respondents might have made application to

---

1. In the *Lipson* case the Court of Appeals for the First Circuit upheld the decision of the District Court sustaining a demurrer to the declaration but conditioned its affirmance in the following terms (76 F.2d 218):

> "The judgment of the District Court in each case is vacated, provided the plaintiff files an amendment to his declarations within fifteen days from the date when the mandate is handed down; otherwise the judgment of the District Court in each case is affirmed with costs."

2. In somewhat similar circumstances the Court of Appeals for the Third Circuit frankly admitted that it erred in attempting to restore a case to the docket of the District Court. *Montgomery* v. *Realty Acceptance Corp.*, 51 F.2d 642, 643 (3rd Cir. 1931), aff'd 284 U.S. 547 (1932).

the District Court pursuant to Rule 60(b) of the Federal Rules of Civil Procedure following the affirmance of the original order of dismissal by the Court of Appeals for relief from that order. Respondents have never at any time sought such relief and it was an essential prerequisite that they do so before a motion to amend could be entertained. *Knox* v. *First Security Bank of Utah*, 206 F.2d 823, 826 (10th Cir. 1953); *Cooper* v. *R. J. Reynolds Tobacco Company*, 256 F.2d 464 (1st Cir. 1958), cert. den. 358 U.S. 875 (1958).

Rules of procedure may sometimes appear arbitrary and, as in this case when they deprive a court of jurisdiction, unnecessarily harsh. However, those rules are the rules approved by this Court and the rules applicable to all litigation in the federal courts. Essentially the rule which petitioner advocates is founded upon the principle of *res judicata*. Like statutes of limitations, it is a rule of repose and is based upon the concept that the public interest requires the termination of all litigation.

2. An additional reason why the writ should be granted lies in the fact that the decision in the court below is in direct conflict with the judgment of the Court of Appeals for the Eighth Circuit in *Young* v. *Garrett*, 159 F.2d 634 (1947), which affirmed the decision of the District Court for the Western District of Arkansas in *Young* v. *Garrett*, 5 F.R.D. 117 (1946). There, as in this case, the District Court granted a motion to dismiss and on appeal the order of dismissal was affirmed. Plaintiffs then applied for a rehearing in the Court of Appeals or, in the alternative, for a remand to allow them to amend their complaint. The Court of Appeals denied the petition for a rehearing but directed (5 F.R.D., 119-120):

> "* * * 'that the case be remanded to the District Court with instructions to permit the appellant

(plaintiff in Civil Action No. 163 and plaintiffs in Civil Action No. 164) to apply to that court for leave to amend his complaint, if he so elects, for the purpose of stating jurisdiction, if possible (see, *International Ladies' Garment Workers' Union* v. *Donnelly Garment Co.*, 8 Cir., 121 F.2d 561, and Rule 15, Federal Rules of Civil Procedure, 28 U.S.C.A., following section 723c), provided that such application be made within a reasonable time and not later than October 1, 1945; and for such further proceedings as are not inconsistent with the opinion of this Court.'"

In due course plaintiffs applied to the District Court for leave to amend and the District Judge held that despite the instructions from the Court of Appeals he had no power to permit an amendment. The court said (5 F.R.D., 121):

> "The plaintiffs were satisfied and insisted upon their original complaints and never indicated any desire to amend until the judgments of dismissal were affirmed on May 9, 1945. *Young* v. *Garrett et al., supra.* To permit the amendment now, it would be necessary for this Court to modify the judgments appealed from and affirmed. This court does not have such power. * * *"

On appeal the Court of Appeals for the Eighth Circuit affirmed the District Court without discussing the jurisdictional point. *Young* v. *Garrett*, 159 F.2d 634 (1947). However, in subsequent litigation between the same parties the Supreme Court of Arkansas had occasion to summarize the proceedings in the federal courts. *Young* v. *Garrett*, 208 S.W.2d 189 (S. Ct. Ark. 1948). In doing so the court stated (p. 192):

> "When the Court of Appeals refused to grant a rehearing and affirmed Judge Miller's order of dismissal, it appears to have attempted to confer upon

> the trial court a power subsequently found to be non-existent. That is the effect of Judge Miller's holding, and on appeal for the second time in these cases he was not reversed. So, in effect, rights of the parties to maintain their suits in Federal Court were settled by the appellate court August 8, 1945, and under Rule 60(b) the judgment was a finality. * * *"

3. On the basis of what has been said above, it is submitted that the question presented is of importance to the orderly administration of justice. We believe that the judgment of the court below is erroneous because it is contrary to the basic principle that once a judgment of a trial court has been affirmed by an appellate court the trial court has no power to disturb that judgment. See, *Home Indemnity Co. of New York* v. *O'Brien*, 112 F.2d 387 (6th Cir. 1940); *Butcher & Sherrerd* v. *Welsh*, 206 F.2d 259 (3rd Cir. 1953); *Knox* v. *First Security Bank of Utah*, 206 F.2d 823 (10th Cir. 1953); *Ginsburg* v. *Stern*, 263 F.2d 457 (3rd Cir. 1959).

The question presented is one of jurisdiction which this Court should decide. Cf., *Bruner* v. *United States*, 343 U.S. 112 (1952); *Realty Acceptance Corp.* v. *Montgomery*, 284 U.S. 547 (1932). That the decision of the court below is interlocutory in the sense that it purports to convey jurisdiction on the District Court is of no significance. See, *Land* v. *Dollar*, 330 U.S. 731, 734(n.2) (1947); *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 685(n.3) (1949); *Myers* v. *Bethlehem Corp.*, 303 U.S. 41, 52 (1938). Resolution of the question involved will not only be of substantial benefit to the parties but may serve to avoid very protracted litigation which will be most burdensome to the courts below. The Court will note from respondents' first amended complaint and from respondents' proposed second amended complaint that this

litigation actually consists of six separate antitrust suits filed against petitioner. That alone is sufficient to indicate the time and expense that a trial would involve.

It is respectfully suggested that the public interest will best be served if the jurisdictional question here presented be decided before protracted litigation is commenced in the courts below.

CONCLUSION

For the foregoing reasons it is submitted that the petition for a writ of certiorari should be granted.

JAMES C. WILSON,
ALFRED F. BURGESS,
LOUIS L. POPLINGER,
Attorneys for Petitioner.